

Given the broad language of Section 617(c)(1) denoting "any" tax-free transfer, the Commission should adopt a general rule exempting any cable system transfer of ownership which is not subject to Federal income tax liability from the anti-trafficking restriction.

2. Sales Required By Operation Of Law

Like tax-free transfers, Congress enacted a broad exception in Section 617(c)(2) for sales required by "operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority." In the NPRM, the Commission interprets this exception as enabling franchising authorities to require the transfer of a cable system that has violated its franchise agreement or that is otherwise providing inadequate service.⁹² It also would include transfers of cable systems pursuant to bankruptcy proceedings or other types of receivership.⁹³

As the Commission suggests, other types of transactions are covered by Section 617(c)(2) in addition to those specified above. Thus, for example, Section 617(c)(2) would encompass court-ordered transfers in divorce or probate proceedings, and government-ordered divestitures. Indeed, NCTA believes that any involuntary transfer required by operation of any applicable law

⁹²Id. at ¶16.

⁹³Id.

or by any federal, state or local governmental authority must be deemed exempt from the three-year holding requirement.⁹⁴

3. Transfers To Affiliated Entities

The last exception, which was discussed earlier with regard to the applicability of the "substantial change in ownership" test, provides that the anti-trafficking rule will not apply to "any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees, controlled by, controlling, or under common control with, the seller, assignor, or transferor." NCTA agrees with the Commission's view that this exception is intended to apply to pro forma transfers as defined in Section 73.3540(f) of the Commission's rules.⁹⁵ As the House Report provides, "transfers of this nature historically have occurred without abuse in the cable television industry" and are not "profiteering transactions of the kind sought to be limited by the 3-year holding period."⁹⁶

As the Commission has recognized, transfers between commonly-owned and controlled entities do not rise to the level

⁹⁴Transfers of municipally-operated cable systems should not be exempt from the anti-trafficking requirement simply because they are governmentally-owned and operated. Such transfers should only be exempt if their transfer is mandated by a court or other governmental authority other than the municipal franchising authority itself.

⁹⁵NPRM at ¶17.

⁹⁶House Report at 119. This provision was meant to exempt transfers between affiliated entities, whether the purchasing entity is under common control with the selling entity by virtue of stock ownership, other equity or debt ownership, or management control. Id.

of a transfer of substantial control for purposes of broadcast licensing procedures. Thus, if the Commission adopts the broadcast "substantial change in ownership" test for cable anti-trafficking rules, inter-company transfers will automatically be exempt. And as noted earlier, the law on the types of transactions that constitute inter-company transfers is well-developed under Section 73.3540(f). Those standards should be applied here.

We also agree with the Commission's conclusion that transfers between affiliated entities should not trigger a new three-year holding period. The holding period should be calculated from the date that the system to be transferred was initially constructed or acquired by the affiliated transferor.

4. Information Requirements

Finally, the Commission seeks comment on the types of information that should be required in order to establish a cable operator's eligibility for each of the exceptions.⁹⁷ We maintain that a cable operator engaged in a sale or transfer of a system should only be required to submit readily available documentation to the franchising authority to substantiate its eligibility for an exception. Such supporting documentation would include, for example, an IRS ruling, a court order or decree or other evidence of an applicable law or governmental action, and any documents

⁹⁷NPRM at ¶18.

demonstrating intra-corporate affiliation. Under these procedures, a cable operator that wishes to transfer ownership of a cable system before the three-year holding period expires would not be unnecessarily burdened with extensive certification or reporting requirements in order to satisfy the statutory exemptions.

**D. The Commission Has Broad Waiver Authority
Under The Anti-Trafficking Provision**

Section 617 grants the Commission broad authority to waive the anti-trafficking rule, provided the public interest is served. The only caveat is that if the local franchise requires the franchise authority to approve the transfer the Commission may not waive the rule unless the franchise authority has approved the transaction. The provision also specifies certain situations, i.e., default, foreclosure, or other financial distress, where the Commission is required to use its waiver authority.

Although the Commission questions whether the provisions for local franchise approval and mandatory waiver operate to limit its waiver authority to those specific situations, it is clear from the opening language of Section 617 that Congress granted the Commission general waiver authority. Section 617 states that "the Commission may, consistent with the public interest, waive the requirement . . ." There is no indication in the statute or the legislative history that Congress intended to limit the waiver authority to only certain types of transfers. Furthermore, given the statute's broad "public interest" mandate,

the Commission should not establish specific waiver criteria regarding the types of showing that would be required in connection with waiver requests.⁹⁸

NCTA also supports the Commission's proposal to grant conditional waivers in cases where the franchise agreement requires the approval of the franchising authority before a transfer is concluded. We agree that the granting of a waiver, contingent upon ultimate approval by the franchising authority where necessary, will enhance the speed and efficiency of the waiver process.

E. The Commission Should Establish Specific Standards On The Information Required For Approval Of A Transfer And Should Establish Definitive Boundaries For The Commencement Of The 120-Day Period

The Act protects transfers of cable properties from a protracted approval process in the local franchise community. Specifically, Section 617(e) requires local franchise authorities to act upon any request for approval of a transfer of a cable system held for the requisite three years within 120 days. Thus, the provision limits the amount of time that a franchising authority has to disapprove a transfer. If the authority fails to act within 120 days, the request will be deemed granted, unless the franchising authority and the requesting party agree to an extension of time.

⁹⁸The provision for waivers of systems in "financial distress" should be applied liberally on a case-by-case basis.

The legislative history of Section 617(e) expressly provides that the 120-day limitation on franchise approval of a sale or transfer commences when the cable operator has provided the franchising authority all information required under the Commission's regulations.⁹⁹ It also provides that local franchising authorities may request additional information.

In adopting regulations to effectuate this 120-day limitation, the Commission should establish specific types of information required for transfer approval. The Commission also should define the limits of the information that local authorities can request. Indeed, as the Commission recognizes in the NPRM, there appears to be no need for the extensive information delineated in the legislative history in connection with every transfer of a cable system.¹⁰⁰ Uniform standards will hasten the approval process and ensure that the statute is not repeatedly tolled by additional information requests. Some boundaries need to be set otherwise the statutory period would never commence to run.

Alternatively, the cities should be required to request any additional information beyond that contained in the initial request for transfer within a certain time period (e.g., 15 days) after the transfer request is filed. Again, a definitive deadline will ensure that local government requests for

⁹⁹House Report at 120.

¹⁰⁰NPRM at ¶23.

additional information do not forestall the running the 120-day period.

F. The Commission Should Be Responsible For Monitoring And Enforcing Compliance With The Anti-Trafficking Restriction

Responsibility for monitoring and enforcing the federal anti-trafficking rule should rest with the Commission, not local franchising authorities. There is simply too much potential for inconsistent application of the rule if local governments take the primary role of interpreting and enforcing the statute. The Commission has the expertise to ascertain substantial changes in ownership, to evaluate complex transactions that may be national in scope, and to adopt fair and uniform standards.

Nevertheless, the Commission tentatively concludes that local franchising authorities should have the responsibility for implementing the federal anti-trafficking rule because they are responsible for awarding franchises, and where appropriate, for approving transfers pursuant to the franchise agreement and local law.¹⁰¹ NCTA submits, however, that the issues at stake in the local transfer approval process are entirely independent of the anti-trafficking requirement. It would be inappropriate for the Commission to abdicate general oversight and enforcement of federal anti-trafficking to local governments concerned primarily with local franchises. Indeed, national uniformity and consistency will be particularly important in MSO transfers where cable systems may be located in multiple jurisdictions.

¹⁰¹Id. at ¶8.

Thus, the Commission should not require cable operators, as proposed in the NPRM, to certify to the franchise authority that the proposed transfer satisfies the three-year holding requirement. If any certification or compliance is required, it should be submitted to the Commission. Any complaints or disputes over compliance can be handled expeditiously under the Commission's special relief rules, 47 C.F.R. Section 76.7. The Commission may also exercise its broad waiver authority in appropriate circumstances.

With regard to sanctions for violation of the rule, NCTA agrees with the Commission's conclusion that the anti-trafficking rule does not require transfers to be rescinded if they are later found to be in violation of the rules. Reversing the transfer would not only be disruptive but would put the system back in the hands of an entity with no interest in its operation. Violations of the rule could be handled in the same manner that the Commission addresses unauthorized transfers of CARS licenses.¹⁰²

**G. The Commission Should Grandfather All Cable
System Transfers That Were Pending At The Time
The 1992 Cable Act Was Passed**

In the interests of fairness and the public interest, the Commission should not apply the new three-year holding requirement retroactively to cable systems that were in the process of being acquired or constructed at the time the 1992 Cable Act was passed. The Commission should specifically grandfather these transfers. This will avoid any undue hardship

¹⁰²47 CFR §78.35.

on cable sellers and buyers who entered into business decisions before the provision was enacted.

Under the rule, all contractual arrangements that pre-date the passage of the Cable Act should be exempt from new anti-trafficking regulations.

III. SECTION 613(a)(2): MMDS/SMATV CROSS-OWNERSHIP PROHIBITION

Section 613(a)(2) of the 1992 Cable Act, 47 U.S.C. §533(a)(2), prohibits common ownership of a cable system and either a multichannel multipoint distribution service ("MMDS") facility or a satellite master antenna television ("SMATV") service facility in the system's franchise area. The Commission has raised a number of questions regarding this provision, including questions regarding the appropriateness under Section 613(a)(2) of the Commission's existing cable/MMDS cross-ownership rules as applied both to MMDS and to SMATV service. The Commission also raises issues relating to grandfathering and enforcement.

A. Cross-Ownership Of Cable and MMDS Systems

As the NPRM indicates, the Commission recently adopted rules addressing the issue of cable/MMDS cross-ownership.¹⁰³ The Commission seeks comment on its tentative conclusion that these

¹⁰³NPRM at ¶25, citing Report and Order, Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990); Order on Reconsideration, Gen. Docket Nos. 90-4 and 80-113, 6 FCC Rcd 6764 (1991); Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

regulations effectively implement the cable/MMDS cross-ownership prohibition in Section 613(a)(2).¹⁰⁴

NCTA generally supports the Commission's tentative conclusion regarding the appropriateness of its existing cable/MMDS cross-ownership rules under Section 613(a)(2). As the Commission has found, its existing prohibition and the statutory provision share the same purpose -- to promote competition in multichannel video distribution.¹⁰⁵ In addition, however, NCTA submits that it is critical that the Commission retain its existing exceptions for rural areas and local programming and its public interest waiver standard.

First, the rural exception to the existing cable/MMDS cross-ownership rule reflects the fact that the public interest is served by allowing cable operators to provide MMDS service in rural areas that would otherwise remain unserved by wireless cable.¹⁰⁶ Consequently, its retention by the Commission will not appreciably reduce "realistic and desired opportunities for wireless cable operators to introduce service competitive with existing cable service."¹⁰⁷

Second, the local programming exception to the cross-ownership rules permits the wider distribution of programming

¹⁰⁴Id. at ¶¶24-25.

¹⁰⁵Id.; see also 47 U.S.C. §533.

¹⁰⁶See Second Report and Order, supra, 6 FCC Rcd at 6799.

¹⁰⁷Id.

produced "in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area."¹⁰⁸ As such, its continuation serves the public interest by preserving an additional outlet for locally originated programming.¹⁰⁹

Finally, the existing public interest waiver standard for cable/MMDS cross-ownership should be retained to allow, where appropriate, cable operators' use of MMDS channels in the provision of multichannel video programming. Section 613(a)(2) expressly authorizes a waiver of the cross-ownership rules where the Commission determines it "necessary to ensure that all significant portions of a franchise area are able to obtain video programming."¹¹⁰ Moreover, in order to fulfill the Congressional objective of promoting the delivery of video programming, such public interest waivers should be considered on an expedited basis.

B. Cross-Ownership of Cable and SMATV Systems

Section 613(a)(2) also prohibits a cable operator from "offer[ing] satellite master antenna television service separate and apart from any franchised cable service, in any portion of

¹⁰⁸Id. at 6800.

¹⁰⁹Id. In retaining the local programming exception, the Commission should again make clear that locally originated programming includes: (1) relevant programming produced elsewhere, so long as it is incorporated in a larger local program; and (2) programming which has aired on local television stations. Id. at 6800, n. 27.

¹¹⁰47 U.S.C. §533(a)(2)(B).

the franchise area served by that cable operator's cable system." The Commission, which does not currently maintain any rules relating to cable and SMATV cross-ownership, has tentatively concluded that it is appropriate to extend the rules and implementing criteria applicable to cable/MMDS cross-ownership to cable/SMATV combinations.¹¹¹ While NCTA generally agrees with the Commission's conclusion,¹¹² we submit that, because of the specific nature of SMATV service and in light of the particular language of Section 613(a)(2), there are certain issues unique to the SMATV portion of the cross-ownership prohibition that the Commission must consider.

In particular, pursuant to Section 613(a)(2), the statutory cross-ownership prohibition applies to a cable/SMATV combination only if the SMATV service is "offered separate and apart from any franchised cable service." At first blush, this language might appear simply to exempt from the cross-ownership rule SMATVs that are physically interconnected with a franchised cable system.¹¹³ Such facilities obviously, do not provide service "separate and apart" from the service provided by a franchised cable operator.

¹¹¹NPRM at ¶26.

¹¹²Thus, for example, NCTA believes that the Commission should extend the rural and local programming exceptions applicable to cable/MMDS combinations to cable/SMATV cross-ownership and should apply the same public interest waiver standard.

¹¹³It is not uncommon for cable operators to provide service to multiple unit dwellings (such as apartments, hotels, etc.) by means of separately constructed facilities that, in whole or in part, are interconnected with the rest of the franchised cable system.

In fact, however, a facility that might otherwise be described as a SMATV, but is interconnected with a cable system, is not a SMATV at all and, thus, is already outside the ambit of the cable/SMATV cross-ownership provision.¹¹⁴

Since an interconnected "SMATV" is not really a SMATV, the exclusion from the cross-ownership rule of SMATVs that do not provide service "separate and apart from franchised cable service" cannot be limited to physically interconnected facilities. Specifically, NCTA submits that the requirement that a SMATV provide service "separate and apart" from franchised cable service is intended to exempt from the cable/SMATV cross-ownership ban SMATVs that are being operated in accordance with, and subject to the terms of, the cable operator's franchise, even though the SMATVs are not physically interconnected with the operator's system. This interpretation of Section 613(a)(2) not only prevents the "separate and apart" language from being rendered meaningless, but also is consistent with the fact that the statutory language expressly looks to whether the SMATV

¹¹⁴The term "satellite master antenna television" (or "SMATV") is not expressly defined in the Communications Act. Nonetheless, the term is generally understood to refer to a facility falling within Section 602(6)(B) of the 1984 Cable Act. Section 602(6)(B) (commonly referred to as the "SMATV exception") exempts a facility from treatment as a "cable system" where it serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." Under Commission precedent, a facility that otherwise meets this definition, but is interconnected to a franchised cable system, is no longer a SMATV. See generally Definition of a Cable Television System, 5 FCC Rcd 7368 (1990) and cases cited therein.

service is being offered separate and apart from "any franchised cable service," not any franchised cable "system."¹¹⁵

The second aspect of the cable/SMATV cross-ownership provision that warrants discussion is the fact that, by the terms of the statute, the ban applies only in those portions of a cable operator's franchise that the operator is actually serving. Thus, if a cable operator has not wired its entire franchise area, the cable/SMATV cross-ownership prohibition does not prevent the operator from instituting SMATV service in the unserved areas.¹¹⁶ Indeed, extending service by means of a SMATV facility may be the only way for some cable operators to provide service in a cost efficient manner to portions of their franchise areas. Furthermore, this interpretation of the cable/SMATV cross-ownership provision is consistent not only with the plain language of the statute, but also with the statutory intent underlying the ban. As the Senate Report states, cross-ownership rules implicate competing policy interests and, thus,

¹¹⁵On occasion, the service provided by a cable operator to an MDU under a bulk contract is not identical to the service offered regular residential customers. For example, hotel service may include (or exclude) pay service options. Also, billing and customer service may be handled separately. Nonetheless, if the cable operator and the franchising authority regard the service being offered as a part of the franchised cable service (and, for example, the franchising authority collects franchise fees on the revenues from the MDU service), the cross-ownership provision does not apply.

¹¹⁶The language limiting the cross-ownership prohibition to those parts of a franchise area in which service is actually being offered applies to MMDS as well as SMATV service. However, because MMDS facilities do not serve discrete areas the way SMATV facilities do, MMDS facilities will rarely be exempted from the cross-ownership prohibition under this language.

[a] policy that only focuses on diversity and restricts the ownership of other outlets may ignore important economies of scale or scope, also raising prices and limiting offerings. Thus, the overall objective in reviewing media ownership is to strive for diversity while balancing genuine and significant efficiencies.¹¹⁷

C. Grandfathering/Enforcement

The Commission asks for comment on the implementation of Section 613(a)(2)(A), which provides for the grandfathering of cross-ownership situations existing on the date of enactment of the 1992 Cable Act (October 5, 1992).¹¹⁸ NCTA supports the Commission's proposal to continue to grandfather cable/MMDS combinations already grandfathered under the Commission's rules and to grandfather any cable/SMATV combinations existing as of October 5, 1992.

The Commission also asks for comment on the enforcement of the cable/MMDS cross-ownership restrictions.¹¹⁹ We strongly agree that these provisions should be enforced in the least burdensome manner. We suggest that, with respect to MMDS, all applicants for licenses (or for license transfers/assignments) be required to certify that ownership of the MMDS facility in question will not violate Section 613(a)(2). Because SMATVs are not licensed, we suggest that the Commission rely on a complaint procedure to enforce the cable/SMATV cross-ownership ban.

¹¹⁷Senate Report at 46 (emphasis added).

¹¹⁸NPRM at ¶27.

¹¹⁹Id. at ¶28.

CONCLUSION

NCTA urges the Commission in this proceeding to adopt implementing rules in accordance with the foregoing comments.

Respectfully submitted,

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APPENDIX A

**THE COMPETITIVE CONSEQUENCES OF
VERTICAL INTEGRATION IN THE CABLE INDUSTRY**

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THE COMPETITIVE CONSEQUENCES OF VERTICAL INTEGRATION IN THE CABLE INDUSTRY

EXECUTIVE SUMMARY

Television consumers have benefitted substantially from cable system operator investments in cable programming networks. These investments, made by cable operators to attract viewers from broadcast television, have resulted in the availability of networks that would not otherwise exist. Because of cable industry investments in networks the nearly 50 million American television consumers who now subscribe to cable can choose from an increased variety of programming choices not previously available to television consumers. Networks specializing in quality children's programming (Nickelodeon), black entertainment programming (Black Entertainment Network), artistic programming (Bravo), science and nature documentaries (Discovery), news (Cable News Network) and public affairs, including coverage of the U.S. Congress (C-SPAN and C-SPAN II) have all been made possible or sustained with cable industry investments and participation.

Although vertical integration has benefitted the viewing public by expanding the availability of new cable programming services, these benefits must be balanced against potential anticompetitive costs associated with vertical integration in the cable industry. In particular, the critics of cable industry vertical integration claim that vertical integration gives cable operators with an ownership interest in programming the potential power to foreclose competitors. Two anticompetitive foreclosure concerns are most

frequently voiced. The first is a fear that vertically integrated cable operators might choose to deter the entry of competing cable programming networks by refusing carriage of these networks on their cable systems. In this way, the cable operators may hope to protect and promote their own internal cable programming networks at the expense of competitors.¹ The other concern is that vertically integrated cable operators might systematically refuse to license the cable programming they have an interest in to competing noncable delivery systems such as home satellite dish owners or MMDS systems. In this way, the cable operators may prevent these alternative delivery systems from developing, thereby protecting the value of their cable franchises.²

The use of vertical integration to foreclose competitors in these two ways has occurred in other industries. Therefore, it is important that such anticompetitive possibilities be examined carefully in the cable industry. The evidence presented in this paper shows that the cable operators are not using vertical integration to further any anticompetitive goals. In particular, the evidence indicates that:

1. Vertically integrated MSOs (multiple system operators) are not using their cable systems as a tool to exclude competing cable programming

¹See testimony of Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America, before the U.S. House Subcommittee on Telecommunications and Finance of the Energy and Commerce Subcommittee, May 11, 1988.

²Testimony of Robert Schmidt, President of the Wireless Cable Association, before the U.S. Senate Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary, April 12, 1989.

networks. Among the specific findings that support this conclusion are:

- a) No MSO, either vertically integrated or not, possesses the economic power to exclude potential competitors from program supply. Even the largest MSO, TCI, cannot, by itself, prevent the entry of a new programming network.
 - b) Vertically integrated MSOs are somewhat more likely to carry their own programming networks. However, this effect is very small (less than three percent) compared to the channel capacity and programming requirements of the average system.
 - c) Therefore, there is no evidence that vertically integrated MSOs systematically exclude programming networks in which they do not have ownership interests. In fact, the four largest vertically integrated MSOs, TCI, ATC, Viacom and Cablevision Systems, are generally more likely than non-vertically integrated cable operators to carry the most popular cable networks in which they do not have an ownership interest.
 - d) The result is that cable consumers of vertically integrated MSOs have a wider selection of program choice among the most popular cable networks than consumers of nonvertically integrated cable systems.
2. Vertically integrated MSOs are not using their ownership interests in cable programming networks as a tool to exclude competing delivery systems. Although exclusive licensing of programming is common in many parts of the entertainment business and is a well accepted contractual element in increasing the value of copyrighted